

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH W. MOCH,

Plaintiff-Appellant/Cross-Appellee,

v

STEPHEN P. AFENDOULIS, THOMAS J.
MULDER, ROBERT J. ELEVELD, and VARNUM,
RIDDERING, SCHMIDT & HOWLETT, LLP,

Defendants-Appellees/Cross-
Appellants,

and

DENNIS C. KOLENDA,

Defendant-Appellee,

and

TEN UNKNOWN JOHN DOES,

Defendants.

Before: Bandstra, C.J., and Hoekstra, and Markey, ¹ JJ.

PER CURIAM.

Plaintiff Joseph Moch appeals by right from an order granting defendants' motion for summary disposition on plaintiff's claims of malicious prosecution and conspiracy to commit malicious prosecution. Defendants Afendoulis, Mulder, Eleveld, and Varnum, Riddering, Schmidt, & Howlett cross-appeal regarding plaintiff's malicious prosecution claim and the denial of sanctions by the trial court. We affirm.

Plaintiff argues that the circuit court erred in granting defendants' motions for summary disposition on the basis of MCR 2.116(C)(7) (immunity granted by law), on the basis of MCR 9.125. This Court reviews de novo the circuit court's grant of summary disposition. *Kerbersky v Northern Michigan Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998). This Court must review the record in the same manner as the circuit court to determine whether the movant was entitled to judgment as a matter of law. *Hetrick v Friedman*, 237 Mich App 264, 266; 602 NW2d 603 (1999).

We conclude that the circuit court did not err in granting defendants' motion for summary disposition. However, we conclude that the circuit court should have granted summary disposition based on MCR 2.116(C)(8) (failure to state a claim upon which relief may be granted) rather than based on MCR 2.116(C)(7) (immunity granted by law). MCR 2.116(C)(8) applies because plaintiff failed to meet his burden of proving an essential element of malicious prosecution, i.e., that defendants initiated or maintained the prosecution against plaintiff.² As a result, plaintiff has failed to state a claim upon which relief may be granted, and defendants are entitled to summary disposition.³

Plaintiff's complaint alleges one count of malicious prosecution and one count of conspiracy to commit malicious prosecution. Under a claim of malicious prosecution, a plaintiff has the burden of proving (1) that the defendant initiated the prosecution against the plaintiff, (2) that the prosecution terminated in plaintiff's favor, (3) that the defendant instituted or maintained the prosecution without probable cause, and (4) that the defendant undertook this prosecution with malice or a purpose other than bringing the offender to justice. *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998). When the prosecution at issue involves a civil proceeding instead of a criminal proceeding, the elements are the same, except the plaintiff also must show that he suffered a special injury. *Friedman v Dozorc*, 412 Mich 1, 32, 48, 57; 312 NW2d 585 (1981); *Hall v Citizens Ins Co of America*, 141 Mich App 676, 683; 368 NW2d 250 (1985).

Matthews, *supra* provides guidance concerning whether plaintiff has stated a claim for malicious prosecution. In *Matthews*, *supra* at 367-368, a dentist was prosecuted, tried, and acquitted of charges of filing false health care claims and false pretenses with intent to defraud. After his acquittal, the dentist brought an action for malicious prosecution against an insurance company alleging that the agents of the insurance company provided inaccurate information to the prosecutor. *Id.* at 376. The *Matthews* Court noted that, in order for the dentist to sustain a prima facie case of malicious prosecution against the insurance company, the dentist had to prove that the insurance company instituted or maintained the prosecution against him. *Id.* at 379. The *Matthews* Court concluded, however, that the dentist failed to prove this element of malicious prosecution because the prosecutor, not the insurance company's agents, initiated, and maintained the prosecution against the dentist. *Id.* at 383-384. Specifically, the *Matthews* Court determined that the prosecution resulted from an investigation by a state detective and a warrant that was authorized by the county prosecutor, in which the detective was the complainant. *Id.* Thus, the county prosecutor, not the insurance company, had the independent authority to initiate the prosecution. *Id.* at 384.

As in *Matthews*, defendants did not initiate or maintain any prosecution against plaintiff. Instead, the proceedings against plaintiff were initiated by the Attorney Grievance Commission based on the investigation conducted by the grievance administrator. Defendants merely provided information to

an investigator and to the hearing panel to show that plaintiff was guilty of misconduct. It was the Attorney Grievance Commission which had the authority and the discretion to initiate and maintain prosecution against plaintiff. Thus, plaintiff has failed to state a claim for malicious prosecution because he has not (and cannot) allege that defendants initiated, instituted, or maintained prosecution against him.

With respect to plaintiff's conspiracy to commit malicious prosecution claim, the court's grant of defendants' motions for summary disposition was correct because this claim also fails to state a claim upon which relief may be granted. In particular, conspiracy cannot constitute a civil cause of action by itself. *Roche v Blair*, 305 Mich 608, 613-614; 9 NW2d 861 (1943); *Earp v Detroit*, 16 Mich App 271, 275; 167 NW2d 841 (1969). To state a claim for conspiracy, a plaintiff must prove the elements of the tort claim. *Earp, supra*. In other words, in order to state a claim for conspiracy to commit malicious prosecution, plaintiff must prove all of the elements of malicious prosecution. As discussed above, however, plaintiff cannot prove an essential element of malicious prosecution, i.e., that defendants initiated or maintained the prosecution against him. As a result, plaintiff has failed to state a claim for conspiracy to commit malicious prosecution, and in turn, summary disposition is proper on this claim as well.⁴

In their cross-appeal, defendants⁵ argue that the circuit court clearly erred when it failed to award defendants expenses and attorney fees as sanctions for plaintiff's frivolous action. Defendants state that plaintiff lacked legal merit in filing his action because (1) he failed to make a sufficient inquiry into whether he suffered a "special injury" as required for malicious prosecution claims, and (2) he filed this action even though he cannot overcome the immunity granted to defendants under MCR 9.125 from this lawsuit. Thus, because his claim lacked merit in these respects, defendants argue that plaintiff should have been sanctioned for filing this suit.

A claim is frivolous when: (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party; (2) the party had no reasonable basis to believe that the underlying facts were true; or (3) the party's position was devoid of arguable legal merit. MCL 600.2591(3)(a); MSA 27A.2591(3)(a), *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266-267; 548 NW2d 698 (1996). A trial court's finding that a claim was not frivolous will not be reversed on appeal unless clearly erroneous. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.*

Upon review of the record here we are not left with a definite and firm conviction that the circuit court's decision not to issue sanctions against plaintiff was mistaken. For example, plaintiff's complaint does not contain any allegations that literal statements made by defendants to the Attorney Discipline Board constituted malicious prosecution. The elimination of such allegations shows that plaintiff was well aware of MCR 9.125 and tried to avoid including statements arguably within the purview of that rule. We conclude that plaintiff generally made a reasonable inquiry into the facts and the law before filing his claim and that the circuit court did not err when it failed to impose sanctions against plaintiff.

We affirm.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

Judge Markey did not participate.

¹ Judge Markey was impaneled to sit and hear this case but removed herself after oral argument and did not participate in this decision. Judges Bandstra and Hoekstra constitute the majority of the hearing panel necessary to decide this matter. MCR 7.201(D).

² This argument was made by defendant Kolenda in his motion for summary disposition, but it was not addressed by the trial court.

³ A trial court's decision that reaches the correct result, albeit for the wrong reason, will be affirmed on appeal. *Gray v Pann*, 203 Mich App 461, 464; 513 NW2d 154 (1994).

⁴ In light of this conclusion, we need not address the parties' arguments regarding whether plaintiff has satisfied the special injury element, whether the statute of limitations barred plaintiff's action, or whether the trial court erred in holding that MCR 9.125 provided defendants an absolute immunity defense.

⁵ Only defendants Afendoulis, Mulder, Eleveld, and Varnum, Riddering, Schmidt & Howlett have cross-appealed.